No. 101

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA,

Appellant,

v.

WARD BAKING CO., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM.

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OCTOBER TERM, 1962

No. 993.

UNITED STATES OF AMERICA,

Appellant,

v.

WARD BAKING CO., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the district court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

Opinion Below.

The opinion of the district court (Appendix A to the Jurisdictional Statement, pp. 16-21) is not yet reported.

Jurisdiction.

The jurisdictional requisites are sufficiently stated in the Jurisdictional Statement.

Statutes and Rules Involved.

The statutes and rules involved are sufficiently stated in the Jurisdictional Statement with the exception of Rule 16 of The Federal Rules of Civil Procedure (28 U. S. C. A.) which provides in pertinent part:

> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> . . .
>
> (6) Such other matters as may aid in the disposition of the action.

Question Presented.

Appellees filed a motion for entry of a judgment against them providing more extensive injunctive relief than would have been required were the allegations of the complaint proved in their entirety. The district court, as part of its pre-trial procedure, issued an order to show cause why appellees' motion for entry of judgment against them should not be granted. The government in response to said order offered neither to amend its complaint, nor to disclose any evidence that would justify more extensive relief than that provided by the proposed judgment, and took the position that "the Government was under no duty to reveal all of its evidence in answer to the rule nisi." The district court thereupon entered its final judgment in the form proposed by appellees. Under these circumstances, is the government entitled to a trial as opposed to the entry of the judgment?

Statement.

The following facts should be added to the statement contained in the government's Jurisdictional Statement in order that this Court may properly consider the question at issue.

On February 8, 1962, the district court gave notice to all parties that the case was "set for hearing and disposition of all pending matters and preliminary pretrial conference on March 22, 1962 at 10:00 A. M. with a view to narrowing of issues, limitation of discovery, and other pertinent matters. Counsel should attend this hearing prepared to discuss date for final pretrial hearing and for date of Trial". This hearing was held.

On May 8, 1962, a pre-trial conference was had "on all remaining issues"[1] in the case. Thereupon, appellees filed with the court a motion for entry of judgment to which was attached a proposed form of judgment on Count II covering all the allegations of fact and specific prayers of the complaint, and more.[2] Appellant also tendered to the court a proposed form of judgment on Count II which was different from that of appellees.

The district court, effectively to utilize pre-trial procedures, ordered appellant to show cause why the court should not enter the judgment proposed by appellees and afforded appellant every reasonable opportunity to comply with its order.[3] Thereafter, appellant failed and refused to comply with said order in that it did no more than submit

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[1] Order To Show Cause, dated May 8, 1962.

[2] See appellees' Motion for Entry of Consent Judgment, dated May 8, 1962; appellees' Amended Motion for Entry of Judgment, dated June 6, 1962.

[3] The district court's Order To Show Cause, dated May 8, 1962, provided for a "written formal reply" by appellant and, in addition, a formal hearing thereon. At the conclusion of said hearing, held on June 14, 1962, appellant declined the opportunity of a

a list of three objections[4] to which appellant limited its oral argument.[5] At no time did appellant attempt to amend its allegations of fact or specific prayers for relief.[6] Nor did appellant submit any affidavits or disclose any evidence in support of the broad scope of injunctive relief which, it asserted, was required by the facts alleged. Instead, appellant maintained that it was not required to disclose its evidence in response to the court's order[7] and indicated that the burden was on appellees to show that there was no basis for the more extensive relief demanded by appellant.[8]

Prior to the pre-trial hearing on June 14, 1962, appellees filed an amended motion for entry of judgment which eliminated all reference to a consent judgment and which substantially expanded the scope of the judgment as originally proposed.[9]

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rebuttal argument, whereupon the court granted 30 days within which appellant was permitted to file a reply brief if it so desired. See Transcript, hearing on June 14, 1962, pp. 76, 81; Order, dated June 22, 1962, p. 2.

[4] See appellant's Statement of Objections in Response to Show Cause Order, dated May 31, 1962.

[5] See Transcript, hearings on June 14, 1962, pp. 18, 26-35.

[6] "The plaintiff [appellant] did not, in response to the order to show cause, file or attempt to file any amendments to the complaint relating to the facts upon which the injunctive relief was prayed for or to broaden the scope of the injunctive relief requested." Order, dated December 10, 1962, p. 3.

[7] "[T]he Government was under no duty to reveal all of its evidence in answer to the rule *nisi*." Appellant's Reply Brief and Statement of Government's Position Re Entry of Defendants' Second Proposed Judgment, dated July 13, 1962, p. 3.

[8] "The defendants [appellees] have offered no proof which would justify the Court in holding that a repetition of the offense in another place with respect to other products sold by them is unlikely." Plaintiffs Memorandum in Support of Its Opposition to Motion For Entry of Consent Judgment, dated June 14, 1962, p. 5.

[9] Appellant, in its Jurisdictional Statement, fails to make clear that appellees' amended motion for entry of judgment filed June 8, 1962, removed all reference to a "consent" judgment. The district court's judgment cannot properly be termed a "consent" judgment.

Between February 8, 1962, and June 14, 1962, the parties made concessions and submitted alternative proposed judgments as to Count II, leaving unresolved only one substantial issue, viz., the injunction against conspiring to fix prices of bakery products covered only sales to the federal government, its agencies and instrumentalities, rather than to the general public as well.[10]

These facts and the statement of the government in its Jurisdictional Statement (omitting the reference to Case No. 11676-Crim-J which is completely dehors the record) constitute the facts to be considered by this Court in support of this motion to affirm.

ARGUMENT.

I. THIS CASE INVOLVES A QUESTION OF PRE-TRIAL PROCEDURE RATHER THAN A QUESTION CONCERNING THE ADMINISTRATION AND ENFORCEMENT OF THE ANTITRUST LAWS.

Appellant, in its Jurisdictional Statement, seeks to magnify beyond reasonable proportions the importance of the case at bar by contending that the question presented is one relating to the administration and enforcement of the anti-

[10] Henry Stuckey, trial attorney for appellant, stated "I think the only argument left with this new judgment, your Honor, is the fact that the Judgment Section wants the decree to go to the general public, not just government installations, and the three-year period extended to five years. I believe it can be summed down to that; at least that's the way I read it at the present time, without having much time to study it." Transcript, Hearing on June 14, 1962, p. 37.

The government agreed to a modification of the provision against appellee's "urging or suggesting to any seller of bakery products the quotation or charging of any price or other terms or conditions of sale of bakery products" by permitting appellees to print the suggested retail price of their products on the package (preticketing). Jurisdictional Statement, p. 6. See Affidavit of M. H. Blackshear, Jr., p. 4, attached to appellees Amended Motion for Entry of Judgment, dated June 6, 1962.

trust laws. In fact, appellant has devoted its entire argument to the matter of consent decrees and negotiations pursuant thereto without discussing the real problem.

Certainly, appellant cannot deny that it failed, in response to the order to show cause, to disclose to either the court or appellees its evidence, if any it had, which would entitle it to relief broader than that proffered by appellees. While appellees concede that non-disclosure of such evidence would perhaps enhance appellant's bargaining position with respect to consent decree negotiations, appellant must suffer the consequences if it withholds such evidence after a pre-trial order reasonably requiring disclosure.

It may be said that one of the main purposes of the pre-trial procedure, especially in protracted cases is a determination of the issues for trial.[11] Mr. Justice Brennan best summed up the intent and purpose of the pre-trial procedure when he stated:

> "* * * The public is fed up with systems under which neither side of lawsuit knows until the actual day of trial what the other side will spring in the way of witnesses or facts. The technique of playing the cards close to the vest and hoping by surprise or maneuver at the trial to carry the day, whether or not right and justice hes on the side of one's client, won't be tolerated. It was and is great sport, but hardly defensible as a system for determining causes according to truth and right. In pretrial procedure, made effective through a precedent broad discovery practice, lies the best answer yet devised for destroying surprise and maneuver as twin allies of the sport.

[11] See *Syracuse Broadcasting Corp.* v. *Newhouse*, 271 F. 2d 910, 914 (2d Cir. 1959); see also *Seminars on Protracted Cases for United States and District Judges*, 23 F. R. D. 319, 21 F. R. D. 395; *The Report on Procedure in Anti-Trust and Other Protracted Cases Adopted by the Judicial Conference of the United States*, 13 F. R. D. 62.

ing theory of justice." [*Package Mach. Co.* v. *Haysen Mfg. Co.*, 164 F. Supp. 904, 910 (E. D. Wis. 1958), *aff'd*, 266 F. 2d 56 (7th Cir. 1959), quoting Mr. Justice Brennan's address to the American College of Trial Lawyers, April, 1958.]

Obviously, pre-trial procedure would be useless if litigants were permitted to reveal or conceal at their pleasure. To effectuate the procedure litigants are required to cooperate with the court. Indeed, the parties at a pre-trial conference "owe a duty to the court and opposing counsel to make a full and fair disclosure of their views as to what the real issues at the trial will be." *Cherney* v. *Holmes*, 185 F. 2d 718, 721 (7th Cir. 1950). This duty, of course, applies to the federal government just as it does to private litigants. *E.g.*, *Daitz Flying Corp.* v. *United States*, 4 F. R. D. 372, 373 (E. D. N. Y. 1945), *rev'd on other grounds*, 167 F. 2d 369 (2d Cir. 1948). Therefore, appellant's contention that it was not required to disclose its evidence in response to the district court's order to show cause is without merit.

While appellant concedes that it is "not entitled to a trial in order to conduct a fishing expedition"[12], the language used in its Jurisdictional Statement indicates that appellant has very little, if any, admissible evidence to support its claim for injunctive relief broader than that proffered by appellees.[13]

As was stated in the case of *Package Mach. Co.* v. *Haysen Mfg. Co.*, 164 F. Supp. 904, 910 (E. D. Wis. 1958), *aff'd*, 266 F. 2d 56 (7th Cir. 1959):

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[12] Jurisdictional Statement, p. 10.

[13] "[T]he additional provisions sought by the government *might* well turn out to be necessary . . . ." Jurisdictional Statement, p. 9. (Emphasis added.) "Of course, after a trial the district court *might* have concluded that the facts developed showed no need for relief any broader than that proposed by the appellees." Jurisdictional Statement, p. 10. (Emphasis added.)

> The court was not required to stand by and permit plaintiff to rest on its general statements of claimed trade secrets and await the outcome of a long expensive trial to see what the alleged trade secrets were. Cf. *Holcomb* v. *Aetna Life Insurance Co.*, *supra*. Nor should the defendants have to wait until plaintiff puts in its case to see what it has to defend against.
>
> Throughout the many motions concerning whether plaintiff has made a definite enough statement of its claimed trade secrets, counsel for the plaintiff has repeatedly retreated to the position that he need only state so much as to enable the defendants to plead. Suffice it to say that counsel seems unaware of Rule 16 and the purpose of pre-trial conferences to eliminate unnecessary lengthy trials.

In *Syracuse Broadcasting Corp.* v. *Newhouse*, 271 F. 2d 910 (2d Cir. 1959), the plaintiff did not properly comply with the district court's pre-trial order to furnish factual information in a protracted antitrust case. The Second Circuit sanctioned the use of drastic remedies in such a case to see that the issues were clearly defined so that the whole case might be kept within manageable proportions, saying at 915:

> It must be remembered that a preclusion order is a drastic remedy . . . and while the district court clearly has the power to issue such an order . . . that power should be exercised only to the extent necessary to achieve the desired purpose—that is, an entirely just disposition of the case in a speedy and efficient manner. Of course in view of its intimate knowledge of the facts, discretion must be accorded the district court in its resolution of these administrative problems. (Citations omitted.)

In the Handbook of Recommended Procedures for the Trial of Protracted Cases adopted by the Judicial Con-

ference of the United States in March 1960, there is a recommendation that in civil antitrust suits brought by the government one or more pre-trial conferences should be devoted to the question of the relief sought by the plaintiff. See, 25 F. R. D. 398. The Handbook, in discussing that recommendation, suggests that a pre-trial discussion be held to determine what relief would be appropriate were the allegations of the complaint proved in their entirety, with a view that discussion of this type made at pre-trial conferences may dispose of the case without trial. To show that concentration on the question of relief in the pre-trial stages can ultimately lead to the settlement of cases, the Handbook cites the case of *United States* v. *Standard Oil Co.*, 1958 CCH Trade Cas., ¶69,212 (S. D. Cal. Oct. 31, 1958). In that case the government had brought a suit against several of the major oil companies charging a conspiracy to restrain and monopolize trade in petroleum products on the West Coast of the United States. The government's complaint sought, *inter alia*, divestiture of the marketing facilities of the defendants. The court held a pre-trial hearing at which counsel were requested to assume that the case had been tried as to liability and that the court had sustained the allegations of the complaint. The question was then posed as to whether the court could, should or would grant divestiture of defendants' marketing facilities as part of the relief granted. Counsel were asked to submit by briefs the relevant facts to be used as a basis for their showing and argument. After hearing and before trial, the district court ruled that it would not grant the government's prayer for relief requesting divestiture of the marketing facilities of the defendants, stating at p. 74,764:

> Well, to get down to the problem of what type of relief the Court could grant in this case. I have come

> to the conclusion that if this case were tried and the defendants were shown to have been in conspiracy to restrain trade and commerce and to monopolize, and assuming the showing made by the defendants as made in this hearing this week, and assuming also the validity of certain matters mentioned by Mr. Lehman [government counsel]—such as irregularities, misconduct, activities since 1950—that this Court should not and would not grant divestiture or divorcement of these service stations.

The order to show cause in the case now at bar served as a pre-trial order requiring the government to come forward with statements of its facts to support the issues which it claimed were essential for trial. When the government elected to withhold any factual information which it might have had to support the injunctive relief relating to sales of bakery goods to the general public, the district judge could properly consider that issue as nonessential for trial. Since appellees requested in their motion that the district judge enter a judgment as if all the allegations of the complaint were proven as true, there were no issues for trial. On the record before it, the court then could consider the case ripe for final disposition. Accordingly, the court entered at pre-trial its final judgment.

Appellant cannot successfully contend that the district court was without power to enter such a judgment during pre-trial. *American Mach. & Metals, Inc.* v. *De Bothezat Impeller Co.*, 82 F. Supp. 556 (S. D. N. Y. 1949) (pre-trial order may pass judgment upon the legal sufficiency of a defense); *Lane* v. *Brown*, 63 F. Supp. 684 (E. D. Mich. 1945) (where no valid service of process, the district court was authorized at a pre-trial hearing to proceed to judgment); *Silvera* v. *Broadway Dep't Store, Inc.*, 35 F. Supp. 625 (S. D. Cal. 1940) (court has power at pre-trial to dis-

miss when the facts admitted and proof show no cause of action). "Since the parties at pre-trial conference agreed upon all necessary and relevant facts and exhibits, a decision on the merits may be entered without formal trial." *Newman* v. *Granger*, 141 F. Supp. 37, 39 (W. D. Pa. 1956), *aff'd per curiam*, 239 F. 2d 384 (3d Cir. 1957).

Furthermore, in the case of *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E. D. Wis. 1962), an action by the United States to restrain alleged violations of the Sherman Act, the court, after holding that the government was not entitled to the inclusion in a somewhat similar decree of a particular controversial provision, further held at 662:

> [T]his court sitting as a court of equity is not powerless under such circumstances to afford the defendants a form of relief other than the Hobson's choice of either further capitulating to an arbitrary and unauthorized demand of the Government or undergoing the ordeal of a costly and protracted trial.

A district court took similar action in *United States* v. *Aero Mayflower Transit Co.*, 1956 CCH Trade Cas., ¶ 68,526 (S. D. Ga. Sept. 20, 1956). Thus, it is apparent that a district court may, in appropriate circumstances, enter final judgment at the pre-trial stage—even in antitrust litigation and over the objection of the government.

Appellant has very appropriately conceded that a district court, in entering such final judgment, has a wide range of discretion to mold an antitrust decree to the exigencies of the particular case.[14] Appellant has also stated that the Attorney General's "authority to make determinations includes the power to make erroneous decisions as well as

[14] Jurisdiction Statement, p. 8.

correct ones.'"[15] It is well to note that such language has also been applied regarding the trial judge's formulation of issues under Rule 16 Fed. R. Civ. P. during the pre-trial procedure. See *Life Music, Inc.* v. *Edelstein*, 309 F. 2d 242, 243 (2d Cir. 1962) (per curiam), where the Second Circuit entered a pre-trial order tentatively defining the issues, which order was entered over the objections of a party who refused formal manifestation of assent thereto.

If appellant is sustained in the position it took in the court below, the inevitable effect would be to thwart and destroy the pre-trial procedures which have been so carefully worked out by the courts over the past several decades, and which are indispensable in the proper disposition of protracted cases.

Accordingly, this appeal presents no substantial question of public importance in the administration and enforcement of the antitrust laws.

II. THE EXERCISE OF THE DISTRICT COURT'S DISCRETION PRESENTS NO SUBSTANTIAL QUESTION FOR DETERMINATION ON APPEAL.

This case does not raise any substantial question within the meaning of Rule 16 of the Revised Rules of the Supreme Court of the United States. Actually the case merely presents a situation where the government is requesting this Court to review the exercise of a trial judge's discretion. The government contests the decree entered by the trial judge in only one major point as shown in the previous Statement. See note 10 *supra* and accompanying text.

This Court has recognized the "wide range of discretion in the District Court" to adapt its decree in Sherman Act

[15] Jurisdictional Statement, p. 13.

cases to the particular case before it and has stated that it "will not direct a recasting of the decree except on a showing of abuse of discretion." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185 (1944). See *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951). The purpose of an injunction in a Sherman Act case is not to punish the defendant. *International Salt Co.* v. *United States*, 332 U. S. 392, 401 (1947). It is to prevent continued or future violations of the Sherman Act. *United States* v. *National Lead Co.*, 332 U. S. 319, 335 (1947). The test of the success of a civil suit is whether it effectively pries "open to competition a market that has been closed by defendants' illegal restraints." *International Salt Co.* v. *United States, supra* at 401. Because the review is of the trial court's discretion the government "must demonstrate that there was *no reasonable basis* for the District Judge's decision." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 634 (1953). (Emphasis added.)

In numerous instances this Court in antitrust cases has refused to modify the district judge's decree because the drafting of the decree is left to his discretion. See, *e.g.*, *Maryland and Virginia Milk Producers Ass'n*, v. *United States*, 362 U. S. 458 (1960); *International Boxing Club* v. *United States*, 358 U. S. 242 (1959); *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953); *United States* v. *National Lead Co.*, 332 U. S. 319 (1947); *Associated Press* v. *United States*, 326 U. S. 1 (1945). Admittedly, the relief granted by the district court can exceed the proven violation, but this Court has pointed out that when this is done, the Court must "be especially wary lest the trial court overstep the correspondingly narrower limits of its discretion...." *International Boxing Club* v. *United States*, 358 U. S. 242, 262 (1959). Certainly the trial judge is not required nor

expected to go beyond the proven violation in order to discharge his duty.

The government relies heavily on *United States* v. *Hartford-Empire Co.*, 1 F. R. D. 424 (N. D. Ohio 1940). There the district court refused to enter a decree, denominated by one of the defendants as a "consent decree," proposed in a pre-trial conference. Actually that case presents a dramatic vindication of the procedure used by the district judge in disposing of the present case. When *Hartford-Empire Co.* finally reached the Supreme Court there had already been a trial which had lasted 112 days, a district court opinion comprising 160 pages including 628 findings of fact and 89 conclusions of law, a 46-page decree and a 16,500-page record. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 392 (1945).

In *Hartford-Empire Co.*, this Court first affirmed the district court's findings of Sherman and Clayton Act violations, which is not surprising when it is realized that the defendants had sought in the district court to have a decree entered against themselves. This Court then said at 323 U. S. at 409-10:

> [T]he court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people,' as the Government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land.' With these principles in mind we proceed to examine the terms of the decree entered. (Footnotes omitted.)

The *Hartford-Empire Co.* case is a vivid illustration of the magnitude and consumption of manpower and money involved in protracted Sherman Act litigation.[16]

In *United States* v. *United States Gypsum Co.*, 340 U. S. 76 (1950), another case upon which the government relies, this Court extended the "territory" of the decree from the "eastern territory of the United States" to all of the United States. This is not as significant as first might appear because the "eastern territory" covered the United States as far west as New Mexico and Wyoming (see *United States* v. *United States Gypsum Co.*, 67 F. Supp. 397, 404 & n. 2 (D. D. C. 1946)), and therefore the extension was actually nominal. Furthermore, in *Gypsum* this Court was faced with policing an entire nationwide industry in which the three companies conspiring to monopolize controlled 89% of the market. *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 368-69 (1948).

Contrasted to that is the present case where the only alleged violation is an isolated one in an infinitesimal area of commerce: sales to naval installations in the Jacksonville, Florida, area. This case does not involve an industry-wide conspiracy, but only a local pocket. Merely because a certain type of relief is granted in one case does not mean that the failure of the court in another case to grant this relief is an abuse of discretion. See *United States* v. *National Lead Co.*, 332 U. S. 319, 338, 358-60 (1947).

In a recent case, *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E. D. Wis. 1962), a district court entered a decree over the objection of the govern-

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[16] Contrast the expenditure of manpower and money in that case with the economy effected by concentration in the pre-trial stages on the question of appropriate relief as found in *United States* v. *Standard Oil Co.* and the *Handbook of Recommended Procedures for the Trial of Protracted Cases*, discussed *supra* at pages 8-9.

ment. That opinon is noteworthy because the district judge points out that the government, by attempting to include unreasonable provisions in consent decrees, is in effect frustrating the consent decree policy of Congress. In the present case, the district court merely entered a decree which it believed adequately concluded the litigation.

The government has characterized the basic error of the trial court as its refusal to hear evidence to make an informed judgment as to how broad the relief in this case should be. Jurisdictional Statement, p. 9. In the presentation of its argument in the district court, counsel for the government pointed out that a trial would provide an adjudication of guilt and would also "result in the public exposure of the defendants' unlawful activities. . . ."[17] Appellees contend that to allow the government to burden the district court with a costly trial because the government wants public exposure and an adjudication of guilt would misuse the concept of civil litigation. Actually the government obtained an adjudication of guilt for the purposes of the case when appellees pleaded *nolo contendere* in case No. 11677-Crim-J. See, *Hudson* v. *United States*, 272 U. S. 451 (1926). Moreover, there was public exposure as a result of the indictment and the fines imposed pursuant to the *nolo contendere* pleas. Even then the government was not satisfied; it wanted a trial.[18]

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[17] Transcript, Hearings on June 14, 1962, p. 30. The government also stated that a trial would afford the opportunity to offer evidence in support of its claim for injunctive relief broader than that offered in appellees' proposed judgment. Neither then nor at any other time did the government state to the district court that it had such evidence or the nature of the evidence it would offer at a trial.

[18] The public exposure sought so vigorously in the district court by appellant (Plaintiff's Memorandum in Support of Its Opposition to Motion for Entry of Consent Judgment, dated June 14, 1962, p. 4; Transcript, Hearings on June 14, 1962, page 30) was not presented here in the Jurisdictional Statement.

In the case at bar, the district court in paragraph VII of its decree expressly retained jurisdiction:

> Jurisdiction is retained for the purpose of enabling any of the parties to this final judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this final judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

It is manifestly clear from this provision of the decree that the government is not precluded from applying to the court for modification of the injunction or for any additional remedies which are required for the effective administration of the antitrust laws as to any violations flowing from the alleged unlawful activities of appellees.[19]

This Court has repeatedly emphasized the prophylactic effect of the retention of jurisdiction by the district court. *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *Associated Press* v. *United States*, 326 U. S. 1 (1945). In *Associated Press* v. *United States*, *supra*, this Court, in refusing to grant the government's request that the injunction be broadened, because fashioning a decree rests largely in the district court's discretion and also because that court had retained jurisdiction, stated at 22-23:

> Furthermore, the District Court retained the cause for such further proceedings as might become necessary. If, as the government apprehends, the decree in its present form should not prove adequate

[19] The reference to "treble damages" on page 12 in the Jurisdictional Statement is irrelevant and misleading since all civil liability that could grow from the alleged violations has been satisfied. No judgment rendered on count II of the complaint could offer aid to private treble damage litigants.

to prevent further discriminatory trade restraints against non-member newspapers, the court's retention of the cause will enable it to take the necessary measures to cause the decree to be fully and faithfully carried out.

In the present case appellant suggests hypothetically that certain evidence could reveal the existence of a fact situation which would justify more relief. Jurisdictional Statement p. 9. In *International Salt Co.* this Court expressly refused to override the district court's discretion and modify the decree to meet a hypothetical objection because the district court had retained jurisdiction by a proviso in its decree which is substantively indistinguishable from the proviso in the present case.

In the case at bar, the district court sitting as a court of equity exercised on the record before it a sound judicial discretion. Appellant's effort to review this discretion does not present a substantial question.

Conclusion.

This appeal does not present a substantial question for determination by this Court, and the motion to affirm should be granted.

Respectfully submitted,

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Certificate of Service.

I, CHARLES L. GOWEN, of counsel in the above case, acting on behalf of all of appellees herein and as a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of May, 1963, I served copies of the foregoing Motion to Affirm upon appellant, the United States of America, by mailing three copies thereof to Lionel Kestenbaum, Esq., Department of Justice, Washington 25, D. C., and by mailing a copy thereof to Archibald Cox, Esq., Solicitor General, Department of Justice, Washington 25, D. C. Each of the foregoing was sent by Air Mail, postage prepaid.

.....

Attorney for American Bakeries Company, acting on behalf of the said client and other appellees named in the foregoing Motion.